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SIME DARBY PLANTATION BHD v. PENGARAH TANAH DAN GALIAN NEGERI MELAKA & ORS

HIGH COURT MALAYA, MELAKA
AHMAD NASFY YASIN J
[JUDICIAL REVIEW NO: MA-25-07-04-2019]
28 AUGUST 2019

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ADMINISTRATIVE LAW: *Judicial review – Application for leave – Land acquisition purportedly for public purpose – Whether initiated on behalf of foreign-controlled property investment company – Whether acquisition process would cause irreparable damage and irremediable injury to applicant – Whether application for leave within mandatory time limit under O. 53 r. 3(6) of Rules of Court 2012 – Whether there were real, substantive and serious issues to be argued at substantive stage – Whether decision amenable to judicial review*

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CIVIL PROCEDURE: *Stay of proceedings – Special circumstances – Land acquisition purportedly for public purpose – Whether initiated on behalf foreign-controlled property investment company – Application for leave for court's intervention to review administrative decision – Whether all proceedings ought to be stayed pending final disposal of judicial review application – Whether acquisition process would cause irreparable damage and irremediable injury to applicant – Whether there were special circumstances to warrant granting of stay*

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The applicant, the registered owner of the 185.5 acre of land ('the land'), sought leave by way of an *ex parte* proceeding under O. 53 of the Rules of Court 2012 ('ROC'), essentially for the court's intervention to review the administrative decisions, actions and omission of the respondents in initiating and proceeding with the compulsory acquisition of the land. The first respondent, the Director of Land and Mines of Melaka ('PTG'), *vide* a Government *Gazette* dated 20 September 2018 declared that the land was to be acquired for a mixed development purpose. The first respondent was named as the party to the acquisition proceeding. The second respondent, the Land Administrator of Jasin District, Malacca, issued the notice of enquiry in Form E for exercising its power on the land enquiry proceedings prescribed by the Land Acquisition Act 1960 ('LAA') following the declaration made by the first respondent. The applicant stated that it discovered about the acquisition for the first time when it was served with a Form A dated 1 October 2018 which required the applicant to attend a land enquiry. The applicant's contention was that it was never notified of any intended acquisition either in Form A or Form D. The plaintiff conducted its own searches to get a copy of Form D published in the State Government *Gazette* to ascertain the purpose of the acquisition. However, the Form D, which declared that the land was purportedly needed for 'Tujuan Pembangunan Bercampur', did not state under which limb of s. 3(1) of the LAA that the acquisition was made. It was the applicant's case that the

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acquisitions was initiated on behalf of the fourth respondent, a foreign-controlled property investment company, although the letter dated 28 September 2018 from the first and second respondents showed that the acquisition was made for a public purpose. It was also contended that the fourth respondent had sought to wield the influence and interventions of the monarch and the Palace in its communications and meeting with the applicant over the acquisition. The applicant contended that the respondents circumvented the applicant's efforts by acting in haste to conclude the acquisition process to cause irreparable damage and irremediable injury to the applicant and therefore initiated the judicial review proceedings and also sought an order to stay all further proceeding in the acquisition of the land until full and final disposal of the judicial review application. The fourth respondent opposed the leave application on the grounds that: (i) that the leave application was made outside the mandatory three months' time limit under O. 53 r. 3(6) of the ROC; and (ii) the decision upon which review was sought was not justiciable.

Held (granting leave for judicial review proceedings):

(1) At the leave stage the only parties, entitled as of right to appear are the applicant and the Attorney General. There is no requirement that the cause papers for the application for leave to be served other than to the Attorney General. The service to the putative respondent will be an exception where the court may order so. A judge hearing an application for leave is entitled either to invite a putative respondent to appear or to give an opportunity to the putative respondent to be heard. In this case, the court had allowed the putative fourth respondent to appear and make submission as, in appropriate cases, especially where the application raises doubts, the putative respondent may help in resolving that doubts. However, the mere fact that the putative respondent was allowed to make submission, does not, *ipso facto*, change the character of the *ex parte* hearing, to become an *inter partes* hearing and thereby obviating the substantive stage. (paras 26 & 27)

(2) Time began to run from 27 March 2019 *ie*, the date on which the second respondent decided to pursue with the acquisition of the applicant's land. Thereafter, on 29 April 2019, the applicant filed for the judicial review. The applicant's application herein was filed well within the three-month period as time began to run, not from the date of Form E but, from 27 March 2019. (paras 35 & 36)

(3) The applicant was not seeking an order against the then His Majesty Yang Di-Pertuan Agong, Sultan Muhammad V. In fact, Sultan Muhammad V was not even named as a possible respondent. The name of His Majesty appeared to have arisen arising from the letter dated 4 April 2018 which was purportedly issued by the Palace to give the sense of decree to the subject matter, which, shorn of all the side shows,

remained an issue of land acquisition. The relief sought was the court's intervention to review the decision by the second respondent to acquire the applicant's land pursuant to the LAA, an administrative and public law decision which, had long been held to be justiciable and amenable to judicial review. Based on the facts and submissions of the applicant, there were real, substantive and serious issues that could only be resolved by mature arguments at the substantive stage. (paras 39, 41 & 44)

(4) The respondents, by acting in haste to conclude the acquisition process, had caused irreparable damage and irremediable injury to the applicant. The second respondent's hasty action in issuing Form H was done *mala fide* with the intention to cover up the respondent's abuse of the provision of the LAA. In this light, a stay ought to be granted to restrain the respondents from taking any further action to facilitate the acquisition. The applicant had successfully demonstrated special circumstances to warrant the granting of a stay to prevent the judicial review from being rendered academic and nugatory. (paras 48 & 49)

Case(s) referred to:

Advance Synergy Capital Sdn Bhd v. The Minister Of Finance, Malaysia & Anor [2011] 7 CLJ 557 CA ***(refd)***

Ajaib Singh v. Jeffrey Fernandez [1970] 1 LNS 4 HC ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [19471 1 KB 233 ***(refd)***

Association Of Bank Officer, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor [2019] 3 CLJ 593 CA ***(refd)***

Ee Chong Pang & Ors v. The Land Administrator Of The District Of Alor Gajah & Anor [2013] 3 CLJ 649 CA ***(refd)***

KCSB Konsortium Sdn Bhd v. Pengarah Tanah & Galian Johor & Ors [2018] 1 LNS 90 HC ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(dist)***

Lim Thian Siang v. Bursa Malaysia Securities Bhd & Anor [2013] 3 CLJ 1214 HC ***(refd)***

Marcel Jude Ms Joseph v. Chief Justice Tan Sri Md Raus Sharif [2017] 1 LNS 1636 HC ***(refd)***

Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 FC ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***

R v. Camden London Borough Council; ex parte Martin [1997] 1 WLR 359 ***(refd)***

Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors [2013] 10 CLJ 663 HC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

Tenaga Nasional Bhd v. Suruhanjaya Tenaga & Anor [2017] 1 LNS 902 HC ***(refd)***

Tenaga Nasional Bhd v. Unggul Tangkas Sdn Bhd & Anor And Other Appeals A
[2018] 4 CLJ 285 FC ***(refd)***
Tengku Muhammad Fakhry Petra lbni Sultan Ismail Petra v. yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC ***(refd)***
Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ B
193 FC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 13(1), 32(1)
Land Acquisition Act 1960, ss. 3(1)(b), 3A(1)(b), 3B, 3C, 3D, 3E C
National Land Code, ss. 16(2), 433B
Rules of Court 2012, O. 29, O. 53 rr. 3(6), 8(1)

Other source(s) referred to:
Wade & Forsyth, *Administrative Law*, 10th edn, p 555

For the applicant - Rosli Dahlan & Dayang Najwa; M/s Lee Hishammuddin Allen D
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For the 1st to 3rd respondents - State Legal Advisor, Melaka
For the 4th respondent - David Mathew & David Ng Yew Kiat; M/s Steven Thiru & Sudhar

Reported by S Barathi E

JUDGMENT

Ahmad Nasfy Yasin J:

Introduction F

[1] This application, in itself, is not a complex one. It is however punctuated by the alleged intervention by the monarchy in the land acquisition process, a case vigorously pursued by the applicant and a case vigorously pursued by the putative fourth respondent, *albeit* of different legal persuasions, as will be discussed below. The application herein too raises a G question on the extent to which a putative respondent may appear and submit its case or making an application at the leave stage of a judicial review proceeding, which essentially is the case here.

[2] The applicant in this leave proceeding to commence judicial review H proceeding is the owner of a tract of land, the particulars whereof will be alluded to in the later part of the judgment. The applicant sought leave, in encl. 1, as is usual, by way of an *ex parte* proceeding under O. 53 of the Rules of Court 2012. It sought, in essence, to seek the court's intervention to review the administrative decisions, actions and omission of the named respondents in initiating and proceeding with the compulsory acquisition of I the land owned by the applicant ("acquisition").

[3] The applicant alleged that the named first and second respondents had wrongfully made the acquisition for the benefit of the putative fourth respondent involving the applicant's land measuring 185.5 acres (75.07 hectares) held under Lot 7498, GRN 49397, Mukim Merlimau, Daerah Jasin, Melaka ("185.5 acre land").

[4] The applicant also sought a stay of all subsequent proceedings relating to the process leading to the acquisition, to maintain the *status quo* of this matter.

[5] I had upon hearing the parties, granted leave for the judicial review proceeding. I had, taking into account the relevant facts and circumstances of this case ordered a stay of proceedings. The followings are my grounds in arriving at the decisions.

Factual Background

[6] The applicant is the registered owner of the 185.5 acre land, which is part of the applicant's Kempas Estate in the Merlimau Division. The applicant is a public listed company and a Government linked company with the Employees' Provident Fund and Permodalan Nasional Berhad as its majority shareholders.

[7] The first respondent named herein is the Director of Land and Mines of Melaka ("PTG"). The first respondent, *vide* a Government *Gazette* dated 20 September 2018 declared that the 185.5 acre land was to be acquired for "Tujuan Pembangunan Bercampur" (loosely translated for a mixed development purpose). As required by s. 16(2) of the National Land Code ("NLC") the first respondent is named as the party to the acquisition proceeding.

[8] The second respondent named here is the Land Administrator of Jasin District, Malacca. The second respondent issued the notice of enquiry in Form E for exercising its power on land enquiry proceedings prescribed by the Land Acquisition Act 1960 ("LAA 1960") following the declaration made by the first respondent.

[9] At this juncture, it is pertinent to observe and state that the first and second respondents are public officers prescribed by the LAA 1960 for exercising the powers of land acquisition and all subsequent proceeding therein.

[10] The third respondent named, meanwhile, is the State Government of Melaka which the applicant contends is reposed with power and control over the administration and management of the State Government agencies and therefore vicariously liable for the actions, decisions and omissions of the first and second respondents named.

[11] The fourth respondent is a foreign-controlled property investment company incorporated in May 2015, with 70% of its shares held by Xinzhongwei Capital Holding Sdn Bhd, which in turn was incorporated in March 2015 and is virtually foreign-owned as 98% by shareholders are foreign national.

[12] The applicant contends that since the acquisition was initiated on behalf of the fourth respondent, the fourth respondent is the acquiring party and the paymaster.

[13] The applicant has over the years cultivated on the 185.5 acre land into an oil palm plantation. This subject land houses infrastructure facilities of the Kempas Estate and five residential buildings including a historical 66 years old colonial-era bungalow for the use of the plantation's senior management.

[14] The applicant stated that it discovered about the acquisition for the first time when it was served with a Form A dated 1 October 2018 which required the applicant to attend a land enquiry. It is the applicant's case that it was never notified of any intended acquisition either in Form A or Form D.

[15] In order to ascertain the purpose of the acquisition, the applicant had to conduct its own searches to get a copy of a Form D published in the State Government *Gazette* on 20 September 2018 ("Form D *Gazette*") which declared the 185.5 acre land is purportedly needed, as stated earlier, for "Tujuan Pembangunan Bercampur". The applicant stated that the Form D does not however state under which limb of s. 3(1) LAA 1960 that the acquisition was made. The Form D also failed to state for which the acquisition was made. However, a letter dated 28 September 2018 from the first and second respondent shows that the acquisition was allegedly made on behalf of Majlis Perbandaran Jasin ("MPJ"), which according to the applicant, was to give a flavor as if the acquisition was made for a public purpose.

[16] In the nutshell, the applicant contends that the acquisition was actually done at the behest of the fourth respondent, a foreign-controlled company. It is also contended that the fourth respondent had sought to wield the influence and interventions of the monarch and the Palace in its communications and meeting with the applicant over the acquisition. The applicant alluded to the following facts:

(i) A letter dated 12 December 2018, the fourth respondent stated:

> (i) "Untuk makluman tuan, pada tarikh tersebut pihak kami akan terlibat dengan pembentangan dan perundingan bersama Yayasan Sultan Muhammad ..." (loosely translated "for your information on the said date we will be involved in the presentation and consultation together with the Sultan Muhammad Foundation")

(ii) "Untuk makluman tuan lagi, wakil daripada Yang Dipertuan Agong iaitu Dato' Malik Marco Caramella ..." (loosely translated "for your further information, the Yang Di Petuan Agong's representative, namely, Dato' Malik Marco Caramella ...")

(ii) An electronic mail dated 10 January 2019, the fourth respondent again emphasised the involvement of the monarch with the use of the words: "Pihak GIA Resources Sdn Bhd, Dato' Malik Marco atas urusan Tuanku Sultan Muhammad V" (GIA Resources Sdn Bhd, Dato' Malik Marco for His Royal Highness Sultan Muhammad V)

(iii) The notes of meeting dated 10 January 2019 which recorded:

(i) Para 2 - "GIA memaklumkan kepada DYMM Tuanku. DYMM Tuanku bersetuju" (GIA had communicated to His Royal Highness and His Royal Highness had accordingly assents);

(ii) Para 6 - "GIA mendakwa bahawa DYMM Sultan mahukan tanah ini" (GIA claims that His Royal Highness decreed desire for the land");

(iii) Para 14 - "Tan Sri Yu Hao (Warganegara Taiwan) adalah rakan niaga DYMM Sultan Muhammad V" (Tan Sri Yu Hao (Taiwan national) is a business partner of His Royal Highness);

(iv) Para 15 - Dato' Malik Marco ada akses terus kepada DYMM Sultan. Segala arahan daripada DYMM Sultan akan disampaikan kepada Dato' Malik Marco (Dato' Malik Marco has direct access to His Royal Highness. All His Majesty's wishes and command will be decreed though Dato' Malik Marco.

[17] At the meeting on 10 January 2019, the fourth respondent also claimed that His Majesty had written a letter dated 4 April 2018, purportedly, signed of it on behalf of Datuk Pengelola Bijaya Di Raja (the Royal Chamberlain) to the applicant informing it about the acquisition. The applicant stated that it did not receive the letter. In any case, the letter stated that:

(i) A development project known as Bandar Pendidikan Bestari had received DYMM YDPA Sultan Muhammad V's ("YDPA") assent;

(ii) "... pembangunan ini akan dilaksanakan melalui Kerajaan Negeri Melaka secara kaedah pengambilan balik tanah mengikut prosedur Kanun Tanah Negara" (the development will be implemented through the Melaka State Government through the medium of land acquisition according to the procedure under the National Land Code)

[18] The applicant stated that upon learning of the acquisition, it requested the fourth respondent to give them the project proposal and layout plan for its development project. However, the fourth respondent refused to give any explanation as to the real reason for the acquisition and the documents requested by the applicant.

[19] The applicant then sought to find an amicable solution by explaining to the fourth respondent that they could purchase other lands owned by the applicant in the Merlimau Division when the lands are offered to the public via an open tender based on the current market value. However, the fourth respondent refused to participate in an open tender process.

[20] The applicant had then appealed to the Chief Minister of Melaka, as the head of the third respondent on three occasions (with the final occasion on 25 March 2019) to seek withdrawal of the acquisition.

[21] The applicant contended that the respondents circumvented the applicant's efforts by acting in haste to conclude the acquisition process to cause irreparable damage and irremediable injury to the applicant, as shown below:

(i) By an electronic mail dated 11 March 2019, the fourth respondent again used the influence of the royal institution by stating "His Royal Highness totally disagree to your suggestion that the land to be tendered";

(ii) On 11 March 2019 (same day), the fourth respondent wrote to the second respondent instructing them to proceed with the acquisition;

(iii) On 19 March 2019 (eight days later), the second respondent notified the applicant of its decision to proceed with the land enquiry on 27 March 2019;

(iv) On 27 March 2019 (8 days later), despite the applicant's protest, the second respondent proceeded with the land enquiry and made a verbal award for compensation, which not only does not reflect the market value of the land, but in fact, at a depressed value.

[22] As a last resort, the applicant initiated the present judicial review proceedings to seek protection from this Honorable Court over its assets.

Finding Of Court

[23] As stated earlier, the present proceeding, as dictated by O. 53 of the Rules of Court, is by way of an *ex parte* proceeding, where the presence of the putative respondents is not required. However, the putative fourth respondent, must have gotten wind of the present application, sought leave of this court to appear and be heard at the leave stage. The fourth respondent contends that matters that will be raised by it are fundamental issues that go directly to the jurisdiction of this court. It cited the case of *Tengku Muhamad Fakhry Petra lbni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan* [2010] 1 LNS 1390; [2011] 1 MLJ 128, among others as the basis of its claim. I will deal with this issue below.

Leave To Appear And Be Heard Of The Fourth Respondent At The Leave Stage Pursuant To O. 53 r. 8(1) Of The Rules Of Court 2012 ("ROC 2012")

[24] It is settled that, under the current O. 53 of the ROC 2012, an application for judicial review is dealt with at two stages; the leave stage and then upon leave being granted, the substantive stages. The procedural history is briefly explained by Gopal Sri Ram JCA in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 at pp. 67-68. The reason for the *ex parte* hearing is explained by Sedley J in *R v. Camden London Borough Council; ex parte Martin* [1997] 1 WLR 359 in the following way:

> The point of the requirement that leave applications must be made *ex parte* was to afford applicants a simple and inexpensive way of finding out whether they had a worthwhile case. As Lord Woolf said in his 1989 Hamlyn Lecture, Protection of the Public - A New Challenge, p. 21, "it enables a litigant expeditiously and cheaply to obtain the view of a High Court judge on the merits of his application." It was also, ironically, to protect putative respondents from the expense and trouble of opposing a case which might have nothing in it.

[25] I would like to also mention that invitation or permission to make submission to the putative respondent may also be made if the putative respondent may "land a knock-out blow on the application for permission: to paraphrase" - see the leading text on the subject - Wade & Forsyth, *Administrative Law*, 10th edn at p. 555.

[26] At the leave stage, the only parties, entitled as of right, to appear, will be the applicant and the Attorney General, the latter being the guardian of public interest. There is no requirement that the cause papers for the application for leave to be served other than to the Attorney General. Thus, service to the putative respondent will be an exception where the court may order so. This is unlike the reformed Part 54 of the UK Civil Procedure Rules which now requires that service to the respondents to be mandatory unless ordered otherwise by the court. Thus, in Malaysia, service is an exception, whereas in the UK, it is mandatory. That being said, the majority as well as the minority judgment in the Court of Appeal in the case of *Tang Kwor Ham & Ors v. Pengurusan Danahartan Nasional & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 accepted the position in law that a judge hearing an application for leave is entitled either to invite a putative respondent to appear or to give an opportunity to the putative respondent to be heard. A similar approach was adopted by the Court of Appeal *Advance Synergy Capital Sdn Bhd v. The Minister Of Finance, Malaysia & Anor* [2011] 7 CLJ 557; [2011] 6 MLJ 376 where the Court of Appeal speaks of the inclusivity approach rather than exclusivity approach to a leave application. There the Court of Appeal had occasion to state as follows:

> [20] Under our O. 53 r. 3(3), at the threshold stage, the applicant must give notice of the application for leave not less than three days before the hearing date to the attorney general's chambers and must at the same

time lodge in those chambers copies of the statement and affidavits. That being the case, the attorney general has the *locus standi* to appear at the threshold stage of an application for judicial review: See e.g. *Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad* [2004] 5 MLJ 495 (HC) per Faiza Tamby Chik J (as he then was) at p 500 [4].

[21] On the other hand, the judge may, at the *ex parte* leave stage, invite the putative respondent to attend and make representations as to whether or not leave should be granted. Such invitation is normally extended where, on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case: *R v. Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109, DIP, CA (UK) per Lord Donaldson MR, as applied by the (then) Supreme Court in *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad* [1995] 3 CLJ 627; [1995] 2 MLJ 442, at p 633 per Edgar Joseph JR FCJ (as he then was). However, the putative respondent is not entitled as a matter of right to appear and demand to be heard: *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60 at p 945 [14] per Zaleha Zahari JCA (delivering a dissenting judgment) (see also my judgment given in the High Court in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53 (HC) at p [18]; *R v. Camden London Borough Council, ex parte Marlin* [1997] 1 All ER 307; *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL), at p. 642, Lord Diplock; and Michael Supperstone QC and James Goudie QC in 'Judicial Review' (1997) at pp. 16.4 and 16.6 - 16.7.)

I must of course mention, for completeness, that in this latter case, the real issue before the Court of Appeal was whether a party, who claimed that will be affected by a decision of a judicial review proceeding could be allowed to intervene and be made a party at the leave stage of the judicial review proceeding.

[27] In the present case and exercising my discretion, I had allowed the putative fourth respondent to appear and make submission as I understand the legal position to be that, and as stated by Sedley J in *ex parte Martin*, above, in appropriate cases, especially where the application raises doubts and the putative respondent may help in resolving that doubts. I must also hasten to mention that the mere fact that I had allowed the putative respondent to make submission, does not, *ipso facto*, change the character of the *ex parte* hearing, to becoming an *inter partes* hearing and thereby obviating the substantive stage. I should not like to equate the process of inviting or allowing the putative respondent to make submission to that of an opposed *ex parte* proceeding now commonly employed in an application under O. 29 of the ROC 2012. In my view, the nature of the process remains an *ex parte* proceeding. On this aspect, I agree with the approach of Hanipah Farikullah J (as Her Ladyship then was) in *Tenaga Nasional Berhad v.*

Suruhanjaya Tenaga & Anor [2017] 1 LNS 902; [2017] MLJU 505 that the proceeding remains *ex parte* and that no appeal may lie against the decision on the leave issue.

[28] In opposing the leave application, the fourth respondent's thrust of the arguments are as follows:

(i) That this leave application is directed squarely to quash the decision to acquire the applicant's land identified as GRN 49371, Lot 7498 Mukim Merlimau, Daerah Jasin, Melaka by way of land acquisition proceeding. In this connection, the applicant's predominant prayer is for "satu perintah *certiorari* untuk membatalkan keputusan responden-responden dalam pengambilan tanah pemohon ..." (for a *certiorari* to quash the respondents' decision in the acquisition to the applicant's land ..)

(ii) That the applicant's entire case is premised upon a purported letter and/or royal decree (titah) from the Palace and/or His Majesty the Yang dipertuan Agong dated 4 April 2018. It is submitted that the Palace and/or His Majesty the Yang dipertuan Agong enjoys sovereignty immunity and cannot be subject to legal process, save and except in his personal capacity which shall be brought in the Special Court (see art. 32(1) of the Federal Constitution).

(iii) Therefore, it is submitted that the application for judicial review, which is premised upon a purported letter and/or royal decree dated 4 April 2018 and which contains declaratory orders against the lstana Negara and Yang dipertuan Agong, cannot be entertained as the decision is not justiciable - *Marcel Jude Ms Joseph v. Chief Justice Tan Sri Md Raus Sharif* [2017] 1 LNS 1636.

(iv) Further, there was delay in making the application for judicial review whereby in cases involving decisions of public authorities, time limits are strictly constructed and the aggrieved persons must act within these time limits. In this regard, an application for leave for judicial review to challenge the decision in acquiring land pursuant to land acquisition proceedings must be made within three months period under O. 53 r. 3(6) ROC 2012 from the date of service of the notice of enquiry in Form E on the registered proprietor of the land - *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017 (FC), *DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang* [2019] 3 CLJ 593 (CA).

(v) In this case, the applicant knew about the said decision on or about 1 October 2018 when Form E was served upon the applicant. Thus, the applicant should have filed the application within three months of the service of Form E dated 1 October 2018 upon the applicant. However, the application was only filed on 29 April 2019 and it is therefore out of time. It is submitted that compliance with the three months' time

period under O. 53 r. 3(6) confers jurisdiction on the High Court and *sans* any extension of time, the court will not have jurisdiction to entertain the application for leave *Mersing Omnibus Co Sdn Bhd v. The Minister Of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] 1 CLJ (Rep) 266, *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; [2013] 4 MLJ 161. Therefore leave ought not to be granted to the applicant due to the inordinate delay or alternatively the application does not have a prayer for an extension of time. In consequence, the court has no jurisdiction to entertain the purported extension of time of application - *KCSB Konsortium Sdn Bhd v. Pengarah Tanah & Galian Johor* & Ors [2018] 1 LNS 90, *Lim Thian Siang v. Bursa Malaysia Securities Bhd & Anor* [2013] 3 CLJ 1214.

[29] In dealing with an application for leave to commence judicial review proceeding, the task is explained by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 where Suriyadi FCJ, speaking for the court had occasion to state as follows:

> [12] For purposes of its application the appellant had alluded to the statutory route of O 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] 1 AC 617). In Malaysia, the Federal Court in *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] 1 CLJ (Rep) 271; [1983] 1 MLJ 68; when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*'. Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[30] Against those principles in mind, I shall address the submissions made before me.

[31] For brevity, the submissions made by the fourth respondent may be broken into two main category:

(i) The time limit point; that the leave application was made outside the mandatory three months' time limit (see O. 53 r. 3(6) ROC 2012);

(ii) That the decision upon which review is sought falls within the purview of non-reviewable area and thus fell outside the reach of the court's jurisdiction. In other words, it is not justiciable.

A **The Delay Point**

[32] On this issue, the fourth respondent had submitted that the applicant's application for judicial review is out of time pursuant to O. 53 r. 3(6) of ROC 2012 which stipulates that a judicial review application must be made within three months.

B

[33] As this case pertains to acquisition of land, the fourth respondent made reference to *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861 where the Federal Court held that the three months period begins to run from the date of service of the notice of enquiry in Form E on the land owner ie, on 1 October 2018. Therefore, the applicant is out of time.

C

[34] I have carefully studied the judgment of the Federal Court in *Kijal Resort*. In my judgment, the Federal Court in that case did not set a scientific formula for the calculation of the three-month period for an applicant to initiate judicial review in all cases involving land acquisition. The decision

D in my view was confined to the fact pattern of that case where in the circumstances, it was justified to say that for the time to run from the date of Form E which falls under the second limb of O. 53 r. 3(6) ROC 2012 that is "when the decision is first communicated to the applicant".

[35] In the present context, it is the applicant's case that time begins to run

E from 27 March 2019 ie, the date on which the second respondent named herein decided to pursue with the acquisition of the applicant's land. Thereafter, on 29 April 2019 the applicant filed for the judicial review and that the applicant is well within time.

[36] Having given this matter careful consideration, I am of the opinion

F that the applicant's application herein was filed well within the three-month period as time begins to run not from the date of Form E but from the date of 27 March 2019 as stated above.

Non-Justiciability

G **[37]** I must say that it is difficult for me to appreciate the arguments canvassed by the fourth respondent on the issue of justiciability. It seems to me what the fourth respondent sought to impress upon me is that in actual fact, the real target of this review proceeding is the decision made by His Highness the Yang dipertuan Agong, to acquire the land by way of royal

H decree. Given the status of the decree as well as the personal status of the Yang dipertuan Agong, the decision is immune from judicial review or not justiciable.

[38] That argument, to my mind seems to have been torn from the pages of medieval history and rooted in feudalistic concept of royal command and

I decree which to my mind has long been jettisoned and has no place in the current era. In the forward march of judicial review, which is rooted in the Constitution, the idea that certain class of persons, falling outside the reach

of the overarching reach of judicial review is anathema to the rule of law. One will note that category upon which the court will be slow to exercise the power of judicial review is shrinking over time. One recent example is the decision by the Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; [2019] MLJU 202 where the court has rejected the long-held opinion that all decisions of the Attorney General are non-justiciable.

[39] In any event, the applicant is not seeking an order against the then His Majesty Yang di Pertuan Agong, Sultan Muhammad V. In fact, Sultan Muhammad V is not even named as a possible respondent. The name of His Majesty appears to have arisen arising from the letter dated 4 April 2018 which was purportedly issued by the Palace to give the sense of decree, if one can say so to the subject matter, which, shorn of all the sideshows, remained an issue of land acquisition: whether it is done in accordance with law and procedure.

[40] In any event too, even for the sake of argument, and that the royal decree is immune from review, a proposition that I have serious doubts, at this juncture and based on the evidence available before me, I am unable to accept that there is a royal decree as a matter of fact. On the contrary, there is to me an argument that could be canvassed at the substantive stage, as described by the applicant that the so-called royal decree and/or the said letter may be an instrument for abuse of LAA 1960 by the fourth respondent and or person that held himself out to be the representative of His Majesty.

[41] To reiterate, it is my considered view that the present proceedings seek the court's intervention to review over the decision by second respondent to acquire the applicant's land pursuant to the Land Acquisition Act 1960, an administrative and public law decision which, has long been held to be justiciable and amenable for judicial review. See for example *Ringgit Exoticka Sdn Bhd v. Pengarah Tanah & Galian Selangor & Ors* [2013] 10 CLJ 663; [2014] 8 MLJ 111.

[42] As stated earlier at this leave stage, the applicant only has to show that there is a *prima facie* case; that this application is not frivolous and vexatious and hopeless, and there is some substance in the grounds supporting encl. 1. The court in hearing an application for leave is not to venture into substantial merits of the case as there is a low threshold for the grant of leave - See *Association of Bank Officer, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228, *Tengku Muhammad Fakhry Petra lbni Sultan Ismail Petra v. yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390.

[43] The applicant in support of its application had submitted as follows:

(i) The acquisition is contrary to the express and implied provision of the LAA 1960 and the Federal Constitution in relation to ownership and deprivation of property. The non-service of Form A or Form D on the

applicant illustrates that the land acquisition exercise was not in accordance with the law and that the provision of art. 13(1) Federal Constitution had been violated as the 185.5 acre land was acquired by the State Authority without due compliance with the LAA 1960 (*Ee Chong Pang & Ors v. The Land Administrator of the District of Alor Gajah & Anor* [2013] 3 CLJ 649);

(ii) It is trite law that the spirit of the Federal Constitution and the special provision of the LAA 1960 must be strictly adhered to by the relevant public authorities and made applicable to all relevant parties;

(iii) An acquisition under s. 3(1)(b) LAA 1960 requires mandatory compliance of ss. 3A to 3E LAA 1960. The need to comply with the mandatory provisions under ss. 3A to 3E LAA 1960 was recently discussed and reaffirmed by the Federal Court in *Tenaga Nasional Berhad v. Unggul Tangkas Sdn Bhd & Anor and Other Appeals* [2018] 4 CLJ 285;

(iv) Section 3A(1)(b) LAA 1960 also mandatorily requires the State Economic Planning Unit ("EPU") in considering an application for acquisition, to assess the capacity and capability of the applicant to carry out the purpose for which the land is to be acquired. Thus non-compliance of the mandatory provision of s. 3A(1)(b) LAA 1960 rendering the acquisition null and void;

(v) The acquisition is tainted with illegality. It is *ultra vires* the express and implied provision of the LAA 1960 and Federal Constitution;

(vi) The acquisition is also an abuse of discretionary power by the respondents. The principle of compulsory acquisition is that private land can only be acquired when needed. The acquisition is not needed considering the applicant had offered its other land within the same Merlimau Division which are more suitable, if needed, for the fourth respondent's mixed development and the acquisition is not needed considering that the fourth respondent can own the applicant's lands through purchase *via* open tender - *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [19471 1 KB 233.

(vii) The respondents' action and decision in continuing with the acquisition tantamount to irrational act as it had fairly affected and oppressed the rights and interests of the applicant - *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

(viii) The decision for the acquisition is tainted with "*mala fide*" and is made to achieve a collateral or ulterior purpose, that is, for a purpose other than the purpose for which it is professed to have been exercised. The fourth respondent had acted "*mala fide*" by abusing the provisions of the LAA 1960 to initiate the acquisition for its personal motive ie, to

circumvent the prohibition under s. 433B of the NLC where the fourth respondent as a foreign-owned company, cannot acquire land without the approval of the State Authority;

(ix) The applicant as the registered proprietor of the 185.5 acre land has a "legitimate expectation" that its enjoyment of its properties will not be disturbed or affected by any party including the respondent.

[44] Having fully considered the facts narrated above, the arguments canvassed by the applicant to my mind there are real, substantive, serious and the issues could only be resolved by mature arguments at the substantive stage.

[45] Thus, to my mind, the facts of the present case favour the granting of leave and I so order.

Stay of Proceeding

[46] The applicant also sought an order to stay all further proceeding in the acquisition of the five applicant's lands until full and final disposal of the judicial review application.

[47] The issue before the court is whether the applicant will suffer "irreparable damage" and "irremediably injured" if the stay is not granted - *Ajaib Singh v. Jeffrey Fernandez* [1970] 1 LNS 4; [1971] 1 MLJ 139.

[48] The applicant had submitted that the fact that the respondents have acted in haste to conclude acquisition process had caused irreparable damage and irremediable injury to the applicant. The second respondent's hasty action in issuing Form H is done *mala fide* with intention to cover up the respondents' abuse of the provision of LAA 1960. In light of the reasons above, a stay ought to be granted to restrain the respondents from taking any further action to facilitate the acquisition.

[49] Having considered the reasons advanced by the applicant, I am of the considered opinion that the applicant had successfully demonstrated the special circumstances to warrant the granting of a stay to prevent the judicial review from being rendered academic and nugatory. I thus order that the acquisition proceeding be stayed pending the disposal of this review proceeding.